FILE COPY

FILED
FEB
CHARLES ELM

IN THE

Supreme Court of the United States

No. 444.

OCTOBER TERM—1931.

VERA ALEXANDER, Administratrix of the Estate of James Alexander, deceased, *et al.*,

Petitioners,

—against—

SPENCER KELLOGG & SONS, INC.,

Respondent.

BRIEF FOR RESPONDENT.

D. ROGER ENGLAR,
CHAUNCEY I. CLARK,
LEONARD J. MATTESON,
GEORGE S. BRENGLE,
Counsel for Respondent,
Spencer Kellogg & Sons, Inc.

INDEX.

	PAGE
Statement	1
POINT I—The operation of the New Jersey Workmen's Compensation Act is not excluded or affected by the General Maritime Law or by the Act of March 3rd, 1851, or the acts amendatory thereof and supplementary thereto	2
POINT II—The application of the New Jersey Workmen's Compensation Act was not affected by the filing of the petition for limitation of liability	12
(a) The petitioners and not this respondent repudiated the New Jersey Workmen's Compensation Act	12
(b) A petition for limitation of liability in Admiralty can never be a repudiation of contractual liability or of a contract under which liability exists	21
(c) Repudiation and the doctrine of anticipatory breach as affecting the compensation contract between the respondent and the employee claimants	24
(d) Mutual repudiation of the compensation contract did not take place and could not take place under the facts here involved. Even if it could and did take place, it would not create a right to sue under the Death Statute, which had no previous existence	27
(e) The present case does not involve any question of election of remedies	31
CONCLUSION—The decision of the Circuit Court of Appeals remitting these petitioners to their remedy under the New Jersey Workmen's Compensation Act should be affirmed	32
APPENDIX A	i

TABLE OF CASES CITED:

PAGE

Alaska Packers v. *Industrial Accident Commission*, 276 U. S. 467 ..... 4, 5

Aquitania, The, 20 Fed. (2d) 457 7

Baizley Iron Works v. *Span*, 281 U. S. at page 232 .. 7

Barnhart v. *American Concrete Steel Company*, 227 N. Y. 531 ..... 9, 10, 23, 31

Benefactor, The, 103 U. S. 239 23

Capital Transp. Co. v. *Cambria Steel Co.*, 249 U. S. 334 22

Central Trust Company v. *Chicago Auditorium*, 240 U. S. 581 ..... 25, 26

City of Norwich, The, 118 U. S. 468 23

Dingley v. *Oler*, 117 U. S. 490 25

Fitzgerald v. *Harbor Lighterage Co.*, 244 N. Y. 132. 15

Grant Smith-Porter Ship Co. v. *Rohde*, 257 U. S. 469 3, 4, 5

Hamilton, The, 207 U. S. 398 8

Harrisburg, The, 119 U. S. 199 8

Industrial Commission v. *Nordenholt*, 259 U. S. 263 .. 3

Langnes v. *Green*, 282 U. S. 531 8

Larscy v. *Hogan & Sons*, 239 N. Y. 298 15

London Co. v. *Industrial Commission*, 279 U. S. 109 5, 6

Luckenbach v. *McCahan Sugar Co.*, 248 U. S. 139 .. 22

Metz, J. L., Furniture Co. v. *Thane Lumber Co.*, 298 Fed. 91 ..... 27, 28

Millers Underwriters v. *Braud*, 270 U. S. 59 ..... 4, 5, 7

Nichols v. *Scranton Steel Co.*, 137 N. Y. 471 27

PAGE

Old Ironsides, The (In re Famous Players-Lasky Corporation v. The Llewellyn J. Morse), 30 F. (2d) 420 6

Pendleton v. Benner Line, 246 U. S. 353..... 22

Richardson v. Harmon, 222 U. S. 96..... 6

Roehm v. Horst, 178 U. S. 1, 17..... 27

Rosengrant v. Havard, 273 U. S. 664..... 7

Southern Pacific Co. v. Jensen, 244 U. S. 205 2, 3, 6, 10, 15

State Industrial Board of the State of New York v. Terry & Tench Co., Inc., et al., 273 U. S. 639.... 3

Titanic, The, 233 U. S. 718 8

AUTHORITIES CITED:

Limited Liability Act of 1851 and acts amendatory thereto, (U. S. Code Tit. 46, secs. 183, 188) 2, 6, 7, 8, 11, 12, 21, 22

New Jersey Workmen's Compensation Act, 1, 2, 6, 9, 10, 12, 14, 16, 17, 29, 30, 31, 32, Appendix pp. i-vi

New York Death Statute.....10, 11, 14, 15

New York Workmen's Compensation Act..... 2, 4

Williston on Contracts, §1328 (Vol. III, p. 2380).. 27

IN THE

Supreme Court of the United States

No. 444.

OCTOBER TERM—1931.

VERA ALEXANDER, Administratrix of the Estate of James Alexander, deceased, *et al.*,

Petitioners,

—against—

SPENCER KELLOGG & SONS, INC.,

Respondent.

BRIEF FOR RESPONDENT.

Statement.

From an examination of the petitioners' briefs, we understand that the petitioners do not deny, in this Court, that the New Jersey Workmen's Compensation Act is, by its terms, applicable to their claims. Accordingly, we shall not discuss the general application of this Act, but will merely refer the Court to some of the leading cases on the point, cited in our brief (pp. 49 and 50) in Case No. 430, which will be argued with this case. For the convenience of the Court we annex hereto as Appendix A, certain relevant provisions of the New Jersey Workmen's Compensation Acts.*

We understand that the petitioners now contest the application of the New Jersey Workmen's Compensation

* The statutes involved are Laws of 1911, Chap. 95; Laws of 1913, Chap. 301; Laws of 1915, Chap. 59; Laws of 1918, Chap. 149.

Act solely on the basis of the maritime aspects of the present case and the pendency of a proceeding for limitation of liability.

POINT I.

The operation of the New Jersey Workmen's Compensation Act is not excluded or affected by the General Maritime Law or by the Act of March 3rd, 1851, or the acts amendatory thereof and supplementary thereto.

This appeal involves only the cases of men who were employed and had previously been working in the factory of the respondent at Edgewater, New Jersey. The contracts of employment were made in New Jersey, and the services rendered were non-maritime (R., pp. 229, 233). So far as these petitioners are concerned, there is nothing maritime about the case excepting the situs of the accident.

The only principle on which the admiralty law has ever been held to exclude a state workmen's compensation act is the principle laid down in *Southern Pacific Co. v. Jensen,* 244 U. S. 205. In that case a man was killed while working as a stevedore on board a ship in the navigable waters of New York State. This Court held that the admiralty had exclusive jurisdiction of the matter, and the New York Workmen's Compensation Law could not constitutionally be applied to the case.

Since that decision a large number of cases have been decided by this Court involving what the petitioners refer to in their brief as the "conflict" between the admiralty law and state workmen's compensation acts.

As a result of these decisions, the cases in which a state workmen's compensation act may and may not be applied have been clearly defined.

For a case to fall within the rule of the *Jensen* decision, so that a state compensation act cannot constitutionally apply, two things are necessary:

First, the accident must happen on navigable waters; otherwise there is no admiralty jurisdiction and the problem here involved cannot arise. *Industrial Commission* v. *Nordenholt Co.,* 259 U. S. 263.

Second, the accident must happen during the course of work which has a direct relation to commerce or navigation, *i. e.,* work which is essentially maritime in character.

In *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, a carpenter was injured on board a ship in navigable waters. The ship, however, was under course of construction, and had not yet been put in service. This Court held that since the work was not maritime and had no "direct relation to navigation or commerce", the case did not fall within the exclusive jurisdiction of admiralty and that the state compensation act could be applied, under the *Jensen* case, and should be applied, in view of the fact that the employee and employer had contracted under it.

In *State Industrial Board of the State of New York* v. *Terry & Tench Co., Inc. et al.,* 273 U. S. 639, a workman was injured while standing on a raft in navigable waters, engaged in building a pier.* This Court (reversing the New York Court of Appeals), held that the rule laid down in the *Jensen* case did *not* prevent

*The facts may be found in the *Matter of Matti Lahti* v. *Terry & Tench Co., Inc.,* 240 N. Y. 292.

the New York Compensation Act from applying, the reason being that the work in which the laborer was engaged at the time of the injury was not maritime.

In *Millers Underwriters* v. *Braud*, 270 U. S. 59, a diver was drowned while diving from a floating barge in navigable waters for the purpose of sawing off the timbers of an abandoned set of ways once used for launching ships. This Court held that the facts disclosed a maritime tort, but that the matter was of merely local concern and the application to it of the state compensation act would not prejudice the harmony and uniformity of admiralty, since the work had no direct relation to commerce or navigation. Accordingly, the Court held the state workmen's compensation act controlled and its exclusive features abrogated the admiralty rights which otherwise would have existed.

These cases, and particularly the *Rohde* case, are precisely in point. The "Linseed King" sank in navigable waters, but the petitioners were regular employees of Spencer Kellogg & Sons, Inc., who worked in the factory at Edgewater. There was nothing even remotely maritime about their employment. And, as in the *Rohde* case, they had contracted under and with reference to the exclusive provisions of the state compensation act.

Another important case in this connection is *Alaska Packers* v. *Industrial Accident Commission*, 276 U. S. 467 (1928). There a man employed to work on a fishing boat and to do general work, was injured while pushing a boat into the water. In holding that admiralty did not oust the local compensation law, this Court said:

> "Whether in any possible view the circumstances disclose a cause within the admiralty

jurisdiction, we need not stop to determine. Even if an affirmative answer be assumed, the petitioner must fail. Peterson was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. *When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law.* The work was really local in character. The doctrine announced in *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, and *Millers Ind. Underwriters* v. *Braud,* 270 U. S. 59, 64, is incompatible with the petitioner's claim"* (p. 469).

In *London Co.* v. *Industrial Commission,* 279 U. S. 109, the earlier cases are carefully discussed and reviewed. After citing the *Rohde* case, the *Braud* case and other similar cases, this Court said (at p. 121):

"Nothing in these cases could apply to the case before us. They may be said to be of an amphibious character. They have an admiralty feature about them in the locality where they occurred, although even this is doubtful with respect to the *Alaska* case. But the contract in the *Rohde* case was non-maritime, the ship was incomplete, and being completed under a non-maritime contract; both parties had made a non-maritime contract with reference to their liabilities and not in contemplation of the admiralty law. The *Braud* case was one of a maritime tort. But it had no characteristic feature of the general maritime law

*Italics ours.

> except locality, and it was very like, in its relation to the state law, to the *Rohde* case. *The employment was not maritime,* and the transaction and the circumstances thus seemed to have but one characteristic that was maritime. This was true of the *Sultan Company* case." (Italics ours.)

The case of *The Old Ironsides* (*In re Famous Players-Lasky Corporation, The Llewellyn J. Morse,* 30 F. (2) 402), cited by the petitioners, went off on the ground that:

> "The employment and service was clearly maritime, as able seamen in navigating the craft on the waters of the Pacific Ocean" (p. 404).

It was correctly distinguished on that ground by Judge Patterson (R. 191).

The petitioners contend, however, that even though the principle of the *Jensen* case does not apply, the Workmen's Compensation Act is excluded by the Act of 1851, providing for a limitation of a shipowner's liability.* We find it difficult to understand either the basis or the limits of the principle contended for. Suppose that while a steamer belonging to this respondent was lying at the Edgewater dock, her boiler exploded without the petitioners' knowledge or privity, injuring a number of men at work in the respondent's factory on the adjacent shore. Any claim which these men might assert for damages would clearly be subject to limitation of liability (*Richardson* v. *Harmon,* 222 U. S. 96). If we understand the petitioners' argument, they would say that the injured men could not recover compensation because the compensation act is in conflict with the limitation statute. But, suppose the result

---

* U. S. Code Tit. 46, Secs. 183, 188.

of the limitation proceedings were a decision that the respondent was guilty of no fault and was entitled to complete exoneration; would the limitation statute still exclude the compensation act? If it does, then the mere recourse to an admiralty forum for the purpose of establishing that there is no fault, cuts off the benefits given by a remedial statute designed to afford relief in the absence of fault. If it does not, then the petitioners' argument must be that in all cases where a vessel is involved and a petition for limitation of liability may possibly be filed, the applicability of the compensation act depends on the question whether or not the shipowner has been negligent.

It would scarcely be profitable to indulge any extended discussion of the extraordinary results which would flow from the petitioners' argument. We think it is sufficiently answered by the fact that this Court has repeatedly dealt with cases arising under workmen's compensation acts and has never suggested that such acts were invalidated by the limitation statute. Indeed, in the case of *Millers Underwriters* v. *Braud*, 270 U. S. 59, this Court upheld the compensation act although the case was apparently one in which a petition for limitation of liability could have been filed. The same result was reached in the case of *Rosengrant* v. *Havard* (273 U. S. 664), the facts of which are stated in the dissenting opinion of Mr. Justice Stone in *Baizley Iron Works* v. *Span*, 281 U. S. at page 232. If the petitioners' argument is sound, it would follow that these cases were wrongly decided. It would also follow that the validity of the compensation act in any given case might depend on the value of the vessel involved and whether the total of the claims could or could not exceed her value. *The Aquitania*, 20 Fed. (2d) 457. It might

also depend on the question whether the case involved one claim or a large number and whether the court in its discretion saw fit to issue an injunction. *Langnes v. Green*, 282 U. S. 531.

It will be noted that the petitioners' argument is not limited to cases where the shipowner invokes the limitation statute. They argue apparently that the limitation statute has the effect claimed irrespective of any action by the shipowner (see brief for Vera Alexander, p. 8; brief for Nora McEachin, p. 39).

We think the petitioners' argument is based upon a complete misconception of the nature and purpose of the limitation statute. That statute does not create any rights but merely limits existing rights. In *The Titanic*, 233 U. S. 718, at page 733, this Court spoke of the limitation statute as follows:

> "That does not impose but only limits the liability—a liability assumed already to exist on other grounds."

In considering this general subject, it must be borne in mind that the admiralty law affords no remedy for wrongful death in such a case as this, and in awarding damages, the admiralty courts are merely enforcing a state statute.*

The Harrisburg, 119 U. S. 199;
The Hamilton, 207 U. S. 398.

It is well settled, however, that if the limitation proceedings were dismissed, and the claimants attempted to

---

* *By statute, Congress has now created a right of recovery for wrongful death on the high seas; and for wrongful death of seamen occurring anywhere in the course of their employment U. S. C., Tit. 46, sec. 688, secs. 761-8. There is still no federal statute giving a right of action for wrongful death in inland waters, excepting in the case of seamen.*

prosecute the actions which a number of them now have pending in the New York State courts, they would find themselves barred by the New Jersey Workmen's Compensation Act, and would be remitted to their remedy befor the New Jersey Compensation Bureau. In this connection we call the Court's attention particularly to the case of *Barnhart* v. *American Concrete Steel Company*, 227 N. Y. 531. In that case the New York Court of Appeals had before it a suit brought by the personal representative of a decedent who had been an employee of a New Jersey corporation. The contract of employment had been made in New Jersey, but the decedent had met his death in New York State while working for the defendant. In the course of its opinion the court said (at pp. 534 to 536):

> "There is a fundamental difference between the Workmen's Compensation Act of New Jersey and the Workmen's Compensation Act of New York. This difference it is important to keep in mind. Under one statute the scheme of compensation is optional, while in the other it is mandatory.
>
> * * * * * * *
>
> The plaintiff's intestate having the right to accept or reject the statutory scheme of compensation, exercised the option to accept it and contracted accordingly with the defendant. Such contract became binding upon him and like any other valid contract, enforceable in the state of New York, unless opposed to its public policy.
>
> * * * * * * *
>
> I am of the opinion that the decedent, at the time of his death, did not have a right of action against the defendant. This must be so unless the contract which he made with it is so contrary to

> the public policy of the state of New York that the court should refuse to enforce it.
>
> * * * * * * *
>
> Is there any public policy of the state that would prohibit the enforcement of a contract made in New Jersey like the one here in question? I know of none. Indeed, shortly after this accident occurred, our own Workmen's Compensation Law took effect."

Accordingly, the complaint was dismissed on the ground that neither the decedent nor his personal representative had any cause of action under the New York Death Statute. As a decision of the highest court of the State of New York, in applying a New York statute, this decision is entitled to great respect, if it is not strictly binding upon this Court. Under these circumstances how can this Court enforce a supposed cause of action which has no existence either under the general maritime law, or under the laws of the state where the acts complained of occurred? Such relief can only be given on the theory that the limitation statute invalidates the New Jersey Workmen's Compensation Law, thereby permitting the New York Death Statute (which would otherwise be inoperative) to come into effect at the time the wrongful death occurs. We submit that such an effect cannot possibly be given to a statute which creates no rights but merely provides for a concourse of claims, and limitation on the total amount of the shipowner's liability. In *The Jensen* case this Court had to deal with a conflict between two systems of law. The limitation statute creates no system of law; it merely provides for a limitation on rights already existing. Merely for convenience in the administration of such a statute the federal courts surely cannot declare one state law invalid and

another effective, thereby creating rights which had no previous existence.

The argument of the petitioners appears to be that the limitation statute of 1851 preempted the field later invaded by the state compensation acts. If this argument were sound, it would seem to follow that the limitation statute would equally invalidate the New York Death Statute upon which most of the petitioners rely.

Finally, we call attention to the fact that it still remains uncertain whether claims under an elective compensation act, such as the New Jersey act involved in this case, are subject to limitation. From the beginning of this litigation this respondent has admitted frankly that it did not know the answer to this problem. In the absence of any authority on the point it felt justified in asking generally for limitation of all liability. Judge Patterson, in the District Court, stated that there could be no limitation against claims of this character (R. 189). Certainly, if his decision is correct, the petitioners' argument must fail; for the limitation statute surely cannot invalidate claims which under no circumstances could be within its field of operation.

So far as the petitioners' argument relates to a mere question of procedure, *i. e.*, whether the admiralty court should itself enforce their right to compensation instead of remitting them to the Compensation Bureau, this respondent prefers not to argue the point. The difficulties in the way of such a disposition of the case are apparent, and have been pointed out by this Court. It may be suggested that the weekly payments provided for by the compensation act could be commuted by the District Court; but this would involve a departure from the terms of the act, in that neither the wisdom of the commutation nor the mode of division between the different dependents would be

passed upon by the Compensation Bureau. Moreover, this procedure would involve payments to parties who are not now before the Court and who, presumably, would not be bound by any decree of the admiralty court in which their rights were not protected. Many of the dependents are infants, for whom guardians *ad litem* would necessarily have to be appointed if they were to be brought into this proceeding. However, this respondent has no desire to oppose any such disposition of the case, if this Court considers that the necessary machinery is available for working out the rights of the parties to this litigation and of the dependents who have not yet been made parties.

POINT II.

The application of the New Jersey Workmen's Compensation Act was not affected by the filing of the petition for limitation of liability.

In addition to their argument that the limitation statute (Act of March 3, 1851), invalidates, *proprio vigore,* the New Jersey Workmen's Compensation Act, the petitioners argue that this respondent, by filing a petition under the limitation statute and asking generally for a limitation of its liability, repudiated the compensation act and become liable for damages, even if it was not so liable before.

(a) *The petitioners and not this respondent repudiated the New Jersey Workmen's Compensation Act.*

The petition for limitation of liability was filed on March 4th, 1927. Although two and a half months had elapsed since the disaster, no claims had been filed

with the New Jersey Compensation Bureau up to that time.

At the time the petition was filed (as appears from Schedule A annexed to it at R. 10) there were some 28 suits pending against this respondent in the New York Supreme Court, New York County, and one libel in the United States District Court for the Southern District of New York, for deaths and personal injuries arising out of the sinking of the "Linseed King". In addition, a number of claims had been made for death and personal injuries, on which suits had not yet been started. Although many of the plaintiffs represented employees, the respondent knew that there were a number of non-employees involved in the disaster. In order to protect itself from the mass of pending and threatened litigation, the respondent followed the usual practice of filing a petition and thus bringing about a concourse of all parties making claims on account of the "Linseed King" disaster. The respondent was careful, however, not to interfere with the right of the various claimants to present their claims to the New Jersey State Workmen's Compensation Bureau. We quote as follows from the prayer for relief at the close of the petition:

> "4. That the Court on the filing of such stipulation as may be determined to be proper, or on the filing of an *ad interim* stipulation, will issue its injunction restraining the prosecution and determination of all actions, suits and proceedings * * *, *with liberty, however, to any claimant to file his claim with the New Jersey State Workmen's Compensation Bureau.*
>
> 5. That the Court in this proceeding adjudge that the petitioner is not liable to any extent for

any loss, damage or injury, nor for any claim whatsoever in any way arising out of or in consequence of the aforesaid voyage, *except such claims, if any, as shall be proper and legal claims under the New Jersey Workmen's Compensation Law*" (R. 7, 8).

The restraining order was similarly qualified (R. 27).

We call attention particularly to the fact that the respondent did not deny its liability under the New Jersey Workmen's Compensation Law. On the contrary, such liability is specifically recognized. It is true that the petition then goes on to ask for a limitation of all liability, including liability under the Workmen's Compensation Act; but this is not in any sense a repudiation of the law, or the respondent's liability under the law. Liability and limitation of liability are two entirely distinct subjects. The petition in this case, following the usual form, prays for two different kinds of relief—first exoneration from all liability and, second, limitation of any liability which may exist. The prayer for exoneration specifically excepts liability under the Workmen's Compensation Act; while the prayer for limitation includes all liability.

To suggest that this course involved any repudiation of respondent's liability under the compensation act is to distort the language of the petition, which expressly recognizes that liability, and expressly requests that the claimants be permitted to file their claims with the Compensation Bureau. In this connection it must be borne in mind that even if the claimants had proceeded to apply for and collect partial compensation under the New Jersey Act, this fact would not have afforded the respondent any protection (excepting a credit for the amount actually paid) in a subsequent suit under the New York

State Death Statute, if it had ultimately been held that the Workmen's Compensation Act was excluded under the principle of the *Jensen* case.

Larscy v. *Hogan & Sons*, 239 N. Y. 298;
Fitzgerald v. *Harbor Lighterage Co.*, 244 N. Y. 132.

Accordingly, it was essential for the respondent's protection that the proceedings before the Compensation Bureau should remain, at least for the time being, under the supervision of the admiralty courts.

This course was also rendered necessary by other circumstances in the case. The persons entitled to compensation would not be the same persons entitled to damages under the New York Death Statute; and the acceptance of compensation by dependents in New Jersey would not necessarily bind executors or administrators appointed in New York. The situation was further complicated by the fact that in a number of cases there was a serious dispute as to who were the dependents of the man involved, and whether he was married to the woman who filed claim as his wife.

The trial of the case began on January 12, 1928, a little more than a year after the disaster. Up to this time no claims had been filed with the Compensation Bureau; nor had any application been made to the District Court to modify its injunction, and permit the bureau to make an award.

At the opening of the trial, counsel for this respondent offered to waive any right which it had to a limitation in respect of workmen's compensation, and formally offered "to pay *to each of the claimants* what he or

she would be entitled to receive under the New Jersey Workmen's Compensation Act", and offered to cooperate in overcoming any technical difficulties in the way of such a disposition of the case (R. 289). Counsel for the claimants indignantly rejected this offer on the ground that both the New Jersey and New York Compensation Acts were "hopelessly inadequate" and said:

> "The claims have not been filed under the Compensation Act for the reason that neither of them has any application or bearing upon this case" (R. 297).

In his closing address, counsel for the claimants again stated his position that the Workmen's Compensation Act did not apply (R. 2011).

There is no mention in the record of the question of repudiation, waiver or estoppel upon which the claimants now lay so much stress.

Judge Hazel referred the question as to the application of the Compensation Act to the Commissioner:

> "Since proctors for claimants assert that they desire an opportunity to show that the New Jersey Workmen's Compensation Law, termed by them an elective act, is inapplicable, and that further testimony is necessary to establish its inapplicability * * *" (R. 140).

This passage from Judge Hazel's opinion affords the clearest possible proof as to the position taken by the respective parties at the trial. This respondent contended that the Workmen's Compensation Act applied; and these petitioners contended that it did not apply.

Claimants did not avail themselves of the opportunity to present additional facts with respect to the application of the Workmen's Compensation Act. They offered no evidence whatever before the Commissioner on this issue. The question of waiver or estoppel was never mentioned. The truth of the matter is that the question of waiver was purely an afterthought, which the claimants first put forward at the argument on the exceptions to the Commissioner's report, in a last effort to escape from the New Jersey Workmen's Compensation Act.

From the beginning of the litigation this respondent has insisted upon this Act, and the claimants have repudiated it. At the last moment the claimants seek to reverse the positions of the parties and put the respondent in the position of having done just what the claimants themselves did.

There is no foundation for the argument now made by the claimants (petitioners here) that this respondent's offer at the beginning of the trial was conditional on its being accepted by all parties. On the contrary the offer was specifically made to *"each of the claimants"* (R. 289); and it was actually accepted and the proposed settlement consummated by the claimant Burke (R. 915-6, 235, 243). The acceptance by Burke came after the respondent's case was closed, but the respondent made no objection on this ground. As a matter of fact, respondent's offer of compensation was not limited as to time. Respondent's counsel indicated that they would feel free to withdraw the offer if it were not accepted before the close of the trial; but it was never in fact withdrawn.

At no time after making the formal offer above mentioned, at the opening of the trial, did the respondent claim the right to limit as against workmen's compensation. This appears in Judge Patterson's opinion (R.

190-1). In the Circuit Court of Appeals respondent expressly stated that it did not claim the right to limit against workmen's compensation.

Judge Patterson, who devoted a *great deal of time and* thought to this question, said:

> "If the term 'waiver' is used in its conventional sense as the intentional relinquishment of a known right, there has been no waiver by the petitioner of its right to insist that all employees be confined to their remedy under the compensation statute. It took the stand in its petition that their rights were to be determined by the Compensation Bureau. It has never departed from this position. True, it erroneously sought to restrict its liability upon the awards which it expected would be made by the Compensation Bureau, but this does not establish waiver.
>
> The elements of equitable estoppel are lacking. The petitioner now says that the employees have no claim against it sounding in damages but have simply the right to get compensation awards under the compensation statute. This has been its position at all stages of the case. There have been no prior representations to the contrary and no prior conduct antagonistic to its present position. Moreover, there is nothing in the case to show that any of the claimants were misled by the position taken by the petitioner. Their failure to obtain compensation awards, so far as shown by the record, was not because of anything done or said by the petitioner in this proceeding, but was due to their belief that the Workmen's Compensation Act, for one cause or another, had nothing to do with the case. * * * It may also be noted that at the opening of the trial before Judge Hazel in January, 1928,

> the petitioner offered to pay all employees and their personal representatives the amounts due them under the Workmen's Compensation Law, abandoning to this extent its claim of limited liability; but the claimants rejected the offer" (R. 190, 191).

The Circuit Court of Appeals also discussed this question at length (R. 2373-6). It reached exactly the same conclusion, *i. e.*, that it was the claimants and not this respondent who manifested an intent not to be bound by the New Jersey Workmen's Compensation Act. After pointing out that most of the claimants had either brought suits in violation of the compensation law or lacked the power to disaffirm the law, the Circuit Court of Appeals said:

> "* * * A few indeed there are, who are neither administrators, nor first broke their compensation contracts; but, though these might have disaffirmed, had there been an unexcused breach, they never elected to do so. The claims themselves suggest nothing of the sort, and they are susceptible of quite another interpretation—the true one. The claimants supposed, and still maintain, that the compensation act did not cover their case at all, and they claimed damages for that reason. They have never therefore manifested any intention to disaffirm, as they must do either in their suit or before (*Hennessey* v. *Bacon*, 137 U. S. 78; *Williston*, §1469). The regular employees were therefore correctly limited to compensation" (R. 2375-6).

The foregoing outline of the facts, as found concurrently by both of the lower courts, demonstrates the absurdity of the petitioners' assertion that they have been delayed for four years in the collection of work-

men's compensation. During the months that elapsed before the petition for limitation was filed, many of them brought suits, but none of them filed any claim for compensation. Their own counsel stated at the trial that the workmen's compensation act did not apply and that no claims had been filed with the Compensation Bureau for this reason. At any time during the ten months which elapsed between the filing of the petition and the trial, the petitioners could have filed their claims with the Compensation Bureau (pursuant to leave granted in the restraining order), and asked the District Court for a ruling on the questions of law presented, *i. e.*, whether the compensation act applied and whether claims under it were subject to limitation. They did not do so because they were determined not to submit to the compensation act. When compensation was offered to them at the trial they refused it, and for four years they have persisted in that refusal. The burdensome and expensive litigation of which they complain has all resulted from their attitude.

The insincerity of the petitioners' argument is well illustrated by the fact that the brief in which the alleged repudiation by the respondent is so bitterly assailed, is filed on behalf of Nora McEachin, as administratrix of Henry A. McEachin. This same administratrix brought a suit for damages before the petition for limitation was filed, and was expressly mentioned in the restraining order (R. 10, 25). And yet, in the face of this fact, practically her entire brief is devoted to a denunciation of the respondent for having compelled her to embark on a protracted and costly litigation, and prevented her, over a period of four years, from obtaining the benefits of the compensation act: this in spite of the fact that she herself had sought to evade the compensation act by bringing a suit for damages; that this suit was only restrained

by the injunction issued in the limitation proceedings; that this injunction expressly left her free to file a claim with the Compensation Bureau; and that she has never, even to this date, availed herself of that privilege.

The brief filed on behalf of Norah McEachin is remarkable in other particulars. It repudiates (p. 32) the statement made at the trial by counsel for other claimants, that the compensation act did not apply; although this particular claimant had previously taken the same position by starting a suit for damages. Even more remarkable is the argument made in the McEachin brief (pp. 34-5) that the beginning of actions for damages was not in violation of the compensation act because these actions were brought by administrators, who were not the parties entitled to compensation. Granting this argument,—*i. e.* that the administrators do not represent the dependents for the purpose of violating the compensation act, how can they claim to represent the dependents for the purpose of rescinding the contract which the compensation act creates?

In the brief filed on behalf of Vera Alexander and others (p. 32), it is stated that some of the petitioners brought actions for damages "after the respondent had defaulted in its obligation to make immediate weekly payments of compensation". In view of the fact that no claims for compensation had been filed, it is not clear how the respondent could be expected to know who the dependents were to whom it should pay compensation.

(b) *A petition for limitation of liability in Admiralty can never be a repudiation of contractual liability or of a contract under which liability exists.*

This Court has repeatedly stated that the purpose of the limitation statute is to encourage shipping by benefiting shipowners. The act might have precisely the oppo-

site effect if a petition to limit is a repudiation of or an offer to rescind a contract. A shipowner, under a bill of lading, may be liable for only $100, though the goods are worth $10,000. He petitions to limit. The cargo owner treats the petition as an attempted repudiation of the bill of lading contract and concurs in the repudiation. He then files claims for $10,000. Limitation is denied, and the shipowner must then pay $10,000 for the loss of cargo. The net result is that the shipowner, merely because he has endeavored to take advantage of a benefit provided by Congress for the encouragement of shipping, has let himself in for a $10,000 liability instead of the $100 liability for which he had contracted and been paid. This is not and cannot be the law. Yet it would necessarily follow, if the filing of a limitation petition is a repudiation of a contract into which the shipowner has entered, or is an offer to repudiate or rescind which the other party can accept.

Personal contracts of a shipowner cannot be limited against. There have been many cases in which this doctrine has been applied. See for example

Pendleton v. *Benner Line*, 246 U. S. 353;
Luckenbach v. *McCahan Sugar Co.*, 248 U. S. 139, 149;
Capital Transp. Co. v. *Cambria Steel Co.*, 249 U. S. 334.

In none of such cases is there the slightest suggestion that the contract has been affected by the litigation. So far as we know, it has never been suggested in any decision that a party cannot litigate the extent of his liability under a contract without thereby putting it in the power of the other side to deprive him of his rights under the contract.

That the petition for limitation did not affect the compensation feature of the case is shown by a consideration of the alternative course which the respondent might have adopted.

When the petition for limitation was filed, suits asking enormous damages had been instituted in the New York state courts on behalf of employees. Limitation proceedings may be started at any time prior to actual payment of a claim or judgment.

The Benefactor, 103 U. S. 239;
The City of Norwich, 118 U. S. 468.

Accordingly, as far as the employee suits were concerned, the respondent could have appeared in the state court actions and pleaded the New Jersey compensation act. This defense would have been valid and the suits would have been dismissed. *Barnhart* v. *American Concrete Steel Co.*, 227 N. Y. 531. The plaintiffs would then have had to go to New Jersey and procure compensation awards. After such awards were made, the respondent could *then* have filed a petition for limitation in admiralty, asking that the awards be payable only out of the limitation fund. Under such circumstances, it could scarcely be contended that the action of the respondent in asking limitation, was a repudiation of the compensation contract, or a repudiation of *liability* for the awards (as distinguished from limitation of the amount payable on the awards).

The respondent could not follow this course, for the simple but all-important reason that suits were also started for enormous amounts by or on behalf of *non*-employees. As to such suits, limitation was essential to protect the respondent from a multiplicity of suits. And only one limitation suit was possible. Under such

circumstances, the fact that the petition was filed before, rather than after the awards, coupled as it was with an *admission* of liability under the compensation act, cannot amount to a repudiation of the compensation contract. If it did, then there was no feasible way in which the respondent could have preserved for determination the important question whether compensation awards are within the limitation statute.

The arguments made by the petitioners are mutually destructive. Apparently they consider that compensation contracts are subject to limitation (McEachin Brief, Point II; Alexander Brief, Point III). But if the very effort to limit against such contracts results in their destruction, then they cannot be limited against because they become non-existent when the petition is filed, and a man obviously cannot limit contract liability where no contract exists.

(c) *Repudiation and the doctrine of anticipatory breach as affecting the compensation contract between the respondent and the employee claimants.*

As we have pointed out, the petitioners were never restrained from taking the first step toward recovering compensation, *i. e.,* filing their claims with the Compensation Bureau. Their position is apparently that they were not called upon to take this step because this respondent had repudiated the contract for compensation, or committed an anticipatory breach, which justified them in treating the contract as at an end.

An anticipatory breach of an executory contract is effected in one of two ways; either by an absolute and unequivocal repudiation or refusal to perform by one of the parties; or by the act of one of the parties in rendering performance on his own part impossible.

Where the alleged repudiation consists of a refusal to perform, the refusal, to constitute a breach, must be "absolute and unequivocal". In the case of *Dingley* v. *Oler*, 117 U. S. 490, this Court defined the extent to which "repudiation" must go in order to constitute an anticipatory breach. The Court said at page 502, that it must be *"a positive, unconditional and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time".** The petition herein clearly was not within this definition. On the contrary, it contained a recognition of the validity of the contract and indicated no intent, express or implied, to repudiate the contract or not to perform it "in any event or at any time". Accordingly, the petition furnished no basis to the claimants for treating the compensation contract as at an end, either under the doctrine of anticipatory breach, or under any analogous doctrine. It will perhaps be urged in this connection that limitation in admiralty is analogous to bankruptcy; and that this Court in *Central Trust Company* v. *Chicago Auditorium*, 240 U. S. 581, held that a petition in bankruptcy, resulting in an adjudication, constituted an anticipatory breach of an executory bilateral contract. From the standpoint of repudiation and anticipatory breach, however, the analogy of an admiralty limitation proceeding to bankruptcy completely breaks down.

In the first place, a petition in bankruptcy is not an anticipatory breach, unless it results in an *adjudication* of bankruptcy. In *Central Trust Company* v. *Chicago Auditorium, supra*, the Court said, at page 592:

"We conclude that proceedings, whether voluntary or involuntary, *resulting in an adjudication*

* Italics ours.

> *of bankruptcy,* are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of *Roehm* v. *Horst, supra.*"*

Since adjudication is essential to turn a voluntary petition into an anticipatory breach, it is clear that no anticipatory breach of the compensation contract has taken place in the case at bar, *since limitation has been denied.*

Moreover, the anticipatory breach involved in an adjudication of bankruptcy consists in the fact that the bankrupt has made performance of the contract impossible. This was specifically stated by this Court in *Central Trust Company* v. *Chicago Auditorium, supra,* where the Court said (p. 591):

> "In short it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement."

In the present case there is no suggestion, either in the limitation petition or elsewhere, that the petitioner is not *able* to perform the compensation contract.

A complete answer, however, to all arguments based on repudiation as an element of anticipatory breach, is found in the fact that since there can be no anticipatory breach of a *unilateral* agreement, any repudiation of a unilateral obligation by the obligor is wholly immaterial. Prior to the accident the compensation contract was bilateral and executory on both sides. The moment the employee was injured or lost his life, the

---

* Italics ours.

contract ceased to be executory as far as the obligation of the employee was concerned, and became purely unilateral. All further performance was due from the employer, and consisted merely of the payment of money. The doctrine of repudiation and anticipatory breach has no application to a unilateral contract.

Roehm v. *Horst*, 178 U. S. 1, 17;
Nichols v. *Scranton Steel Co.*, 137 N. Y. 471, 487;
Williston on Contracts, § 1328 (Vol. III, p. 2380).

Accordingly, from whatever standpoint the matter is considered, the petition to limit cannot be considered as an anticipatory breach of the compensation contract or as a "repudiation" of the contract upon which any rights can be based. It remains to consider whether the matter is affected by any doctrine of rescission or mutual repudiation amounting to rescission.

(d) *Mutual repudiation of the compensation contract did not take place and could not take place under the facts here involved. Even if it could and did take place, it would not create a right to sue under the Death Statute, which had no previous existence.*

There may of course be rescission by mutual consent, and such consent may be evidenced by acts instead of words. Rescission is a new contract, which involves meeting of minds and intent. As the Circuit Court of Appeals for the Eighth Circuit said in *J. L. Metz Furniture Co.* v. *Thane Lumber Co.*, 298 Fed. 91, 92,

> "It is fundamental that, in the absence of a legal ground for rescission, a contract cannot be rescinded or abrogated, except by mutual agree-

> ment, or meeting of the minds, similar to that required to establish the contract. To put it another way: An offer to terminate an existing contract is not effective until uneqivocally accepted."

That the respondent had no intent to rescind the compensation contract is obvious. The existence and validity of the contract were expressly recognized in the petition for limitation and have been insisted upon throughout by the respondent.

That the petitioners never attempted to rescind the compensation contract is also clear, and was found by both of the lower courts. What the petitioners did was to maintain, from the beginning, that there was not and never had been any compensation contract. Accordingly the elements of a rescission were entirely lacking. The situation was that one party (the respondent) claimed, at all times, that there was a compensation contract, and that this contract remained in force; the other parties (the petitioners) claimed that there never had been a compensation contract and hence the question of rescission could not arise.

So far as concerns deceased employees it is apparent not only that a rescission did not take place but that it could not take place in this proceeding, in which the deceased employees are represented only by administrators. The administrator acts in a representative capacity as far as the compensation contract is concerned,—under certain circumstances he can collect compensation for the beneficiaries, where such a proceeding is approved by the Compensation Bureau. But certainly he cannot release or repudiate rights which belong to a beneficiary, without the beneficiary's consent. In the present case many of the beneficiaries of the compensation contracts are infants, none of whom are before the Court, except

as they are represented by the various administrators. Neither guardians nor guardians *ad litem* have been appointed, as far as appears. Very possibly the beneficiaries (or their non-existent guardians) would rather have compensation than to take what is left of an award in admiralty after legal expenses have been paid. How can a beneficiary be deprived of the *right* to compensation through something done by an administrator? And how can infant beneficiaries be deprived of rights under the compensation contract by an administrator, when the New Jersey Statute (Chap. 149, Laws of 1918, §5, Appendix A, p. v) specifically says that proceedings on behalf of infants shall be instituted "by a guardian, guardian *ad litem* or next friend"?

A conclusive answer to any suggestion that an administrator may rescind or repudiate or otherwise affect the compensation contract is found in the provisions of §4 of the 1918 amendment to the New Jersey Compensation Act. That section provides:

> "Whenever an employer or his insurance carrier and an injured employee, or the *dependents of a deceased employee,* shall, by agreement, duly signed, settle upon and determine the compensation due to the injured employee, or to the dependents of a deceased employee, as provided by law, the employer or the insurance carrier shall forthwith file with the bureau a true copy of such agreement. Such agreement shall not bind the employer or injured employee, or the dependents of a deceased employee, unless approved by the bureau" (§4, ch. 149, N. J. Laws, 1918).*

Since only the "*dependents* of a deceased employee" (and not the administrator) can validly contract as to

*Italics ours.

the *amount* of compensation, *a fortiori* only the dependents (and not the administrator) can rescind or repudiate the compensation contract *in toto*. A repudiation of an executory contract never constitutes an anticipatory breach unless the other party so elects. The right of election—if it exists—obviously vests in the dependents and not in the administrator.

As we have already pointed out (*supra*, p. 21), the brief filed on behalf of Norah McEachin (at pp. 34-5) makes the very point which we are making here,—*i. e.*, that the administrators cannot bind the dependents, who are the beneficiaries under the compensation act, or surrender their rights. Once this is conceded, however, it necessarily follows that the persons whose rights it is sought to determine are not before this Court; and any decree which this Court might grant in favor of the administrators would not be binding on the dependents who have not been parties to any supposed rescission.

Furthermore, even if some right or power to rescind or repudiate the compensation contract did vest in the administrator, it must, in this case, vest in the New Jersey and not the New York administrator, and only New York administrators are before this Court. The compensation contract is a New Jersey asset of the decedent; it cannot be destroyed or repudiated by a New York administrator.

Moreover, the compensation act definitely abrogated any right to recover damages for death. The statute so provides (§II, par. 8, chap. 95, New Jersey Laws of 1911; Appendix B in Petitioner's Brief, Case No. 430). Accordingly, when the employee lost his life, the right to recover damages for his death under the New York

death statute was non-existent. Not merely was there no remedy, but there was no right.

Barnhart v. American Concrete Steel Co., 227 N. Y. 531.

We submit that no breach, by either or both of the parties, of their obligations in respect of compensation, can create a right to sue under the death statute, which did not exist at the time of death or for months thereafter.

(e) *The present case does not involve any question of election of remedies.*

No question of election of remedies is involved in this case. Such a question only arises when a party has two existing remedies, or two rights both of which cannot be enforced and one of which must be chosen. The employees have never had but one right—that to compensation. As far as employees are concerned, the respondent has never had but one right—the right to pay compensation—and that is not a right but an obligation. There is no scope for the application of any doctrine of election of remedies, where, as here, only one right and one remedy exist, and where the respondent's sole effort has been to procure a judicial determination of the *extent* of an admitted obligation. The law reports, including those of New Jersey, are full of cases where employers have litigated the question as to the existence and extent of their obligations under compensation statutes. So far as we can ascertain, it has never even been suggested that by so doing they rendered themselves liable for damages in a case where the compensation act would otherwise apply. Indeed the New Jersey act specifically contemplates and provides for the litigation of questions arising under its

terms (New Jersey Laws of 1918, Chapter 149, sec. 19, Appendix A, p. vi).

We call attention also to the fact that suits for damages are constantly being dismissed on the ground that the plaintiffs' only remedy is compensation under the compensation acts of the various states. If the petitioners' theory were correct, it would be held that the plaintiffs had lost their right to compensation by bringing an inconsistent proceeding. So far as we know, this contention has never been made and, if made, it certainly would not be taken seriously. In such cases there has been no election of remedies, because it has been established in the unsuccessful litigation that the plaintiff had only one remedy, *i. e.*, compensation. The plaintiff did not elect one of two remedies, but merely mistook his remedy.

Conclusion.

The decision of the Circuit Court of Appeals remitting these petitioners to their remedy under the New Jersey Workmen's Compensation Act should be affirmed.

February 2, 1932, New York City.

Respectfully submitted,

D. ROGER ENGLAR,
CHAUNCEY I. CLARK,
LEONARD J. MATTESON,
GEORGE S. BRENGLE,
Counsel for Respondent,
Spencer Kellogg & Sons, Inc.

APPENDIX A.

CERTAIN STATUTES RELATING TO THE DISTRIBUTION OF WORKMEN'S COMPENSATION FUNDS.

New Jersey Laws of 1911, Chapter 95.

"13. In case of death compensation shall be computed, but not distributed, as follows, to wit:

"(a) For any dependent widow, one-half of wages.

"(b) For any dependent [illegible] one-half of wages.

APPENDIX.

"13. (a) The [illegible] and [illegible] dependent upon the [illegible] death or death [illegible] step-parents, grandparents, grandchildren, child [illegible] legitimate children, brothers, sisters, half sisters, niece, nephew. Legal dren shall, in every particular, be [illegible] natural children; provided, however, that in every case shall be conclusively presumed as to the decedent's widow and natural children under sixteen years of age who were [illegible] part of the decedent's household at the time of the death. The provision of this act [illegible] shall be equally applicable to the above named any dependent of a deceased employee who during the period covered by such [illegible] to which the widow of a deceased employee [illegible]

terms (New Jersey Laws of 1918, Chapter 145, p. Appendix A, p. 24).

We call attention also to the fact that suits for [illegible] are constantly being dismissed on the ground the plaintiffs' only remedy is compensation under compensation acts of the various states. If the Travers theory were correct, it would be held that plaintiffs in fact their right to compensation by bringing an inconsistent proceeding. So far as we know contention has never been made and, if made, naturally would not be taken seriously. In short, there has been no election of remedies, because never established in the unsuccessful litigation that plaintiff had only one remedy, i. e., compensation. Plaintiff did not elect the wrong remedies, but merely mistook his remedy.

APPENDIX.

Conclusion.

The decision of the Circuit Court of Appeals that these petitioners to their remedy under the New Workmen's Compensation Act should be affirmed.

February [illegible], 1923, New York City.

Respectfully submitted,

D. ROGER ENGLAR,
CHAUNCEY I. TRAM[illegible],
LEONARD J. MATTI[illegible],
GEORGE S. BRENNA[illegible],
Counsel for Respondents
Spencer Kellogg & Sons, Inc.

APPENDIX A.

Certain Relevant Provisions of the New Jersey Workmen's Compensation Acts.

New Jersey Laws of 1911, Chapter 95.

"12. In case of death, compensation shall be computed, but not distributed, on the following basis:

(a) For one dependent, thirty-five per centum of wages.

(b) For two dependents, forty per centum of wages.

* * * * * * *"

"12. (g) The term 'dependents' shall apply to and include any or all of the following who are dependent, upon the deceased at the time of accident or death, namely: husband, wife, parents, step-parents, grandparents, children, stepchildren, grandchildren, child in esse, posthumous child, illegitimate children, brothers, sisters, half brothers, half sisters, niece, nephew. Legally adopted children shall, in every particular, be considered as natural children; *provided, however,* that dependency shall be conclusively presumed as to the decedent's widow and natural children under sixteen years of age who were actually a part of the decedent's household at the time of his death. Every provision of this act applying to one class shall be equally applicable to the other. Should any dependent of a deceased employee die during the period covered by such weekly payments, or should the widow of a deceased employee remarry during

such period, the right of such dependent or of such widow to compensation under this section shall cease. *It is further provided,* that the foregoing schedule applies only to persons wholly dependent, and that in the case of persons only partially dependent, except in the case of the widow and children, who were actually a part of the decedent's household at the time of his death, the compensation shall be such proportion of the scheduled percentage as the amounts actually contributed to them by the deceased for their support constituted of his total wages and the provision as to an eight-dollar minimum shall not apply to such compensation. In determining the number of dependents, where the deceased employee was a minor, the number of persons dependent upon said deceased employee shall be determined in the same way as if said deceased employee were an adult, notwithstanding any rule of law as to the person entitled to a minor's wages.

(h) Compensation shall be computed upon the foregoing basis. Distribution shall be made among dependents, if more than one, according to the order of the Workmen's Compensation Bureau, which shall, when applied to for that purpose, determine, upon the facts being presented to it, the proportion to be paid to or on behalf of each dependent according to the relative dependency. Payment on behalf of infants shall be made to the surviving parent, if any, or to the statutory or testamentary guardian."

"12. (k) The compensation in case of death shall be subject to a maximum compensation of seventeen dollars per week and a minimum of eight dollars per week; *provided,* that if at the

time of the injury, the employee receives wages of less than eight dollars per week, then the compensation shall be for the full amount of such wages per week. This compensation shall be paid during three hundred weeks; *provided,* that if at the expiration of three hundred weeks there shall be one or more dependents under sixteen years of age, compensation shall be continued for such dependents until they reach sixteen years of age, at the schedule provided under clauses (a), (b), (c), (d), (e), and (f), of paragraph twelve."

"19. In case of death compensation payments may be made directly to dependents of full age and on behalf of infants to the surviving parent, if any, or to the statutory or testamentary guardian of any such infant: or the Workmen's Compensation Bureau, on application or when a petition has been filed, may order such payments to be made to the administrator or executor of the decedent, or to such person as would be appointed administrator of the estate of the decedent."

"21. (b) The compensation hereby provided may be commuted by said Workmen's Compensation Bureau at its present value, when discounted at five per centum simple interest, upon application of either party, with due notice to the other, if it appears that such commutation will be for the best interest of the employee or the dependents of the deceased employee, or that it will avoid undue expense or undue hardship to either party, or that such employee or dependent has removed or is about to remove from the United States, or that the employer has sold or otherwise disposed of the greater part of his business or assets.

(c) Unless so approved, no compensation payments shall be commuted."

New Jersey Laws of 1913, Chapter 301.

"1. In any case where an infant or minor under the age of twenty-one years shall be entitled to receive a distributive share of or compensation by virtue of the provisions of the act to which this act is a supplement any duly authorized guardian of the person and property of and for such infant or minor appointed by the surrogate or the Orphans' Court of the county in which said infant or minor resides shall be authorized and empowered to act for such infant or minor to the same extent as a duly appointed next friend or guardian ad litem appointed by any court of law of this State and any such guardian appointed by the surrogate or Orphan's Court shall have the right and authority to compromise and make composition in behalf of such infant or minor of any disputed claim for compensation arising under the provisions of the act to which this act is a supplement; *provided*, the terms of such compromise or composition shall be approved by an order of the Court of Common Pleas of the county wherein such infant or minor resides upon presentation of the facts and the terms thereof to said court, before the same shall become effective."

(The above-quoted section of Chapter 301 of the New Jersey Laws of 1913 was in force at the time of the "Linseed King" disaster. It was amended by Chapter 225 of the New Jersey Laws of 1928, the amendment providing that the Workmen's Compensation Bureau, and not the Court of Common Pleas, should have power to approve compromises or compositions.)

New Jersey Laws of 1915, Chapter 59.

"1. In case where an infant or minor under the age of twenty-one years shall be entitled to receive a sum or sums amounting, in the aggregate, to not more than two hundred and fifty dollars as compensation for injuries, or as a distributive share by virtue of the provisions of the act to which this act is a supplement, whether heretofore or hereafter arising, the father, mother or natural guardian upon whom such infant or minor shall be dependent for support shall be authorized and empowered to receive and receipt for such moneys to the same extent as a guardian of the person and property of such infant or minor duly appointed by the surrogate of the Orphans' Court of the county in which such infant or minor resides, and the release or discharge of such father, mother or natural guardian shall be a full and complete discharge of all claims or demands of such infant or minor thereunder."

New Jersey Laws of 1918, Chapter 149.

"3. The Commissioner of Labor, the deputy commissioners and the referees appointed under this act, either sitting individually or together, shall have exclusive original jurisdiction of all claims for compensation arising under the act to which this act is a supplement, and the acts amendatory thereof and supplemental thereto. * * * * * * * * *"

"5. * * * Proceedings on behalf of an infant shall be instituted and executed by a guardian, guardian ad litem, or next friend, and payment, if any, shall be made to such guardian, guardian ad litem, or next friend. Said bureau shall prepare

and print forms of petitions and shall furnish assistance to claimants in the preparation of such petitions, when requested so to do."

"11. * * * The official conducting the hearing shall, within fifteen days after the rendering of the judgment, mail to each of the parties a statement of the substance of such judgment. The judgment of the said bureau shall be final and conclusive between the parties and shall bar any subsequent action or proceeding, unless reopened by the said bureau or appealed as hereinafter provided."

"19. Either party may appeal from the judgment of said commissioner, deputy commissioner or referee, to the Court of Common Pleas of the county in which hearing was held, by filing with the secretary of said bureau, and with the clerk of the county where such hearing was held, a notice of appeal. * * *"

Section 19 (*supra*) was in force at the date of the "Linseed King" disaster (Dec. 20, 1926). The section was amended by Chapter 388 of the New Jersey Laws of 1931 (effective June 30, 1931) to read as follows:

"19. Any judgment of the Workmen's Compensation Bureau shall be reviewable by certiorari only."